***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S BRIEF

75-1237

DOCKET NO. 75/1237 BRS

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

*Appellee,*

*-against-*

ROBIN G. BARON, ET AL.
[INCLUDING PETER HORVAT],

*Defendant-Appellant.*

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## BRIEF FOR DEFENDANT-APPELLANT HORVAT

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TABLE OF CONTENTS

TABLE OF STATUTES

15 U.S.C. § 77q. Fraudulent interstate transactions ..... 1

(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly--

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or decit upon the purchaser.

15 U.S.C. § 77x. Penalties ..... 1

Any person who willfully violates any of the provisions of this subchapter, or the rules and regulations promulgated by the Commission under authority thereof, or any person who willfully, in a registration statement filed under this subchapter, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both.

15 U.S.C. § 78j. Manipulative and deceptive devices ..... 1

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange--

* * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. 78ff. Penalties ..... 1

(a) Any person who willfully violates any provision of this chapter, or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78o of this title, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $10,000, or imprisoned not more than two years, or both, except that when such person is an exchange, a fine not exceeding $500,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

(b) Any issuer which fails to file information, documents, or reports required to be filed under subsection (d) of section 78o of this title or any rule or regulation thereunder shall forfeit to the United States the sum of $100 for each and every day such failure to file shall continue. Such forfeiture, which shall be in lieu of any criminal penalty for such failure to file which might be deemed to arise under subsection (a) of this section, shall be payable into the Treasury of the United States and shall be recoverable in a civil suit in the name of the United States.

(c) The provisions of this section shall not apply in the case of any violation of any rule or regulation prescribed pursuant to paragraph (3) of subsection (c) of Section 78o of this title, except a violation which consists of making, or causing to be made, any statement in any report or document required to be filed under any such rule or regulation, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact.

17 C.F.R. § 240.10b-5. Employment of Manipulative and Deceptive Devices ..... 1

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(1) to employ any device, scheme or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make

the statements made, in the light of the circumstances under which they were made, not misleading or

(3) to engage in any act, practice or course of business which operates or would operate as a fraud or deceit. upon any person,

in connection with the purchase or sale of any security.

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## Preliminary Statement

Defendant Horvat appeals from a judgment of conviction of an indictment charging him, together with other individuals, with conspiracy to violate Title 15, United States Code, Sections 77q(a), 77x, 78j(b), 78ff and Rule 10(b)5 (17 CFR, Section 240.10b-5), and Title 18, United States Code, Section 1341, as well as substantive violations of these sections and with violation of Title 18 of the United States Code, Section 2, aiding and abetting with reference to the substantive counts above mentioned. The docket number of the said indictment was S 74 Cr 1226.

The conspiracy in substance alleged that the defendants (other than the defendant Horvat) arranged to sell to a "shell" corporation, Elinvest, Inc. ("Elinvest"), certain assets of a private corporation known as Leisure Time Marine Corporation

("LTMC"). Elinvest, the indictment charged, had no substantial assets and LTMC owned a marina located in Long Island. It is further charged that the defendants (other than defendant Horvat) arranged to have securities issued in exchange for the said marina and to distribute the said securities through various fraudulent means, including the writing of improper opinion letters, bribery of brokerage houses and a mutual fund, and pay-offs induced by threats. The conspiracy counts specifically charge Horvat with fraudulently inducing customers of Baron & Co., Inc., a brokerage house, to purchase Elinvest stock at artificially inflated prices.

Counts 7 to 13 charge violation of Titles 15 United States Code, Section 78j(b) and 17 CFR, Section 240.10b-5. Counts 9, 10 and 13 relate to customers of defendant Horvat. With reference to the remaining counts, 7, 8, 10 and 12 of these counts relate to customers of other defendants. Nonetheless, defendant Horvat was found guilty of all counts, 7 through 13.

Counts 14 through 18 allege violations of Title 18 United States Code, Section 1341, the mail fraud statute. None of Horvath's customers appear in these. Nonetheless, he was found guilty with respect to all counts, 14 through 18.

## THE FACTS

### The Grand Jury Proceeding

On May 2, 1973, defendant Horvat appeared before the grand jury and was examined by Edward Levitt, a Special Assistant United States Attorney, with respect to Elinvest (Affidavit of John Walker in opposition to Horvat's motion to dismiss the indictment, paragraph 3(b)(i)). On February 14, 1975, Mr. Levitt was called as a witness for the government at the trial, and, for the first time, revealed that he had appeared as a witness before the same grand jury which had heard Horvat's testimony and which subsequently indicted him (1892).* Immediately after this revelation defendant Horvat moved to dismiss the indictment (Docket number 67; 2008). This motion was denied (Docket number 9).

### Peter Horvat

Defendant Horvat was a salesman employed by the brokerage firm of Baron & Co. from approximately February to August, 1971 (3283). The principal of the firm was Robin Baron (3284). One day, approximately two or three months after Horvat commenced his employment, Baron came into the salesroom and announced that the firm had a large block of Elinvest stock to sell (3284). He told the salesmen that Elinvest was in the marina business and that it had plans for expansion through acquisition of other marinas, which would make it the largest marina on Long Island (3286).

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* All numerical references are to the stenographic minutes of the trial.

While Baron did not go into all of the details, he stated that a representative of the company would come in and meet with the salesmen in a week or two (3286). That person was George Linder (3287).

George Linder

Linder had an extensive background in corporate finance, having been president and chief executive officer of Camera Corporation of America (3087), and director of corporate finance and executive vice-president of Kenneth Bove & Company, a brokerage firm (incorrectly designated in the record as "Kenneth Bogan & Company"; 3088). He had experience in a wide variety of corporate financial arrangements including primary and secondary underwritings, debenture offerings, rights offerings and private placements (3087), in addition to which he was knowledgeable in the areas of mergers and acquisitions and management consulting (3088). He was also a yachtsman who had been yachting all of his life, as well as a powerboat racer who had won many domestic, national and international races (3122), and had researched the history and future of the boating industry (3123).

Linder first became acquainted with Elinvest as the result of his attending the closing of the merger between it and Leisure Time Marine Corporation ("LTMC") at the suggestion of Steven Hill, who was Linder's personal counsel, counsel to his company, and also counsel to Elinvest (3094). He met Van Aken at the closing and arranged to meet with him subsequently to discuss Elinvest (3095). At this subsequent meeting, Van Aken explained the merger and told Linder that certain individuals had free trading

stock as a result thereof (3095). One of these individuals was Steven Duke, a Professor of Law at Yale University (3096), who had obtained an opinion letter from another Yale Law School professor, Lee A. Albert, to the effect that Duke's shares could be sold without a registration statement being filed therefor (3104). Van Aken informed Linder that Duke had 50,000 shares to sell (3097) and suggested that Linder obtain documents necessary for an investigation of the company from Hill, whom Van Aken would authorize to disclose them, and that he speak to William Rambusch, the president of the company (3098).

Linder went to Hill's office and examined all of the documents relating to the merger as well as the opinion letters with respect to Duke's shares (3100). Among these were the merger agreement (3100), together with a variety of sub-documents relating to the merger, an agreement relating to the purchase of the Joad-Conklin marina (3101), a letter of investment relating to persons who were receiving Elinvest stock in the merger (3102), an opinion letter form the attorney for LTMC to counsel for Elinvest (3102), an opinion letter from counsel for Elinvest to the attorney for LTMC (3102), a waiver of notice of meetings (3102), resolutions of the board of directors of Elinvest (3102), a notice of a special meeting of the board of directors of Elinvest (3103), an LTMC financial statement (3103), letters from Elinvest's counsel to its transfer agent with reference to the transfer of shares to former shareholders of LTMC (3104-5), and the opinion letter from Lee A. Albert regarding Duke's shares (3104).

Linder discussed selling Duke's stock with Baron (3108),

whom he had known for several years (3090) and with whom he had had social as well as business contact (3092). Baron indicated an interest in the situation (3109). There followed a meeting in Hill's office between Linder, Baron, Michaelina Martel (Linder's partner (3089)), Van Aken and Hill, at which time questions were asked about Elinvest, particularly by Baron, who was concerned with ascertaining, to his satisfaction, that the sale of Duke's stock would be completely legitimate (3110). Baron was not satisfied with the material available and suggested that Linder visit the marina to obtain additional information (3110-11).

A day or so later Linder and Martel went to the marina and met with William Rambusch for several hours (3114). They were told that the marina had slips for 700 boats and had dealership arrangements with Trojan Yacht Company, Whitaker Corporation, Outboard Marine, Evinrude and Johnson (3114-15). The sales potential of Toad-Conklin was discussed as well as the proposed acquisition of Ted Bates, a yacht brokerage business (3115). Linder reviewed Elinvest's most recent balance sheet with Rambusch and converted it to a pro forma balance sheet by amending each item thereon based upon subsequent occurrences (3118-19). He also obtained copies of, and examined, 10 to 12 brochures relating to boats for which Elinvest was an authorized dealer (3120-21) as well as an appraisal of Elinvest's property (3124). An anticipated rezoning was discussed, which would have increased the value of the property from the appraised value of about one million dollars to about three million dollars (3125). Linder felt that the rezoning would be successful based upon the fact that it was reason-

able to do so and the fact that a stockholder of Elinvest was the Suffolk County Republican Leader (3125-26). Linder toured the marina and saw that there were 36 acres of waterfront property with one-half to three-quarters of a mile of bulkheading (3126), which contributed greatly to its value (3127-28), a main store, an office complex, roads, woodworking shops, metal shops and traveling cranes (3126-27). He also found out that zoning ordinances had been passed in Suffolk County which effectively prevented the establishment of new marinas, a fact which enhanced the potential value of Elinvest's property (3127).

The Due Diligence Meeting

After his visit to the marina, Linder held a meeting at the offices of Baron & Co., which was attended by Martel, Baron and several salesmen including Horvat (Linder identified Horvat at the trial as having been the same person who was at the meeting; 3130). He brought with him all of the documents which he received from Hill and exhibited and discussed them, one by one, with the salesmen (3131). The meeting lasted several hours during which time the salesmen's questions were answered (3132). Linder went over his pro forma balance sheet (which was written on yellow sheets of paper (Linder, 3116-17; Horvat,* 3289) and indicated what his projections were for the future profits of Elinvest (Linder, 3133; Horvat, 3289). He went over the boat brochures

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* References to Horvat's testimony are to the excerpts of his grand jury testimony read into the record.

(3137-3137a), the appraisal of the property (3138) and the Lee A. Albert opinion letter regarding Duke's stock (3138). The potential acquisitions were discussed, as well as the fact that by virtue of them, the marina would be the largest on Long Island (3289).

Following the due diligence meeting, the registered representatives at Baron & Co. proceeded to sell Elinvest stock at a price of $4 a share (3285), a price which was up to one dollar below the bid price and up to two dollars below the asked price quoted in the "pink sheets" (3567-69).

## POINT I

THE TRIAL COURT ERRED IN REFUSING TO DISMISS THE INDICTMENT BASED UPON THE DUAL ROLE OF EDWARD LEVITT AS PROSECUTOR AND WITNESS IN THE GRAND JURY

It is firmly established in the record that Edward Levitt appeared before the Grand Jury as Prosecutor on May 2, 1973, for the purpose of interrogating defendant PETER HORVAT and that Edward Levitt testified before that same Grand Jury on April 10, 1974 (1892), Affidavit of John Walker (paragraph 3(6)(iii)), submitted in opposition to defendant Horvat's motion to dismiss the indictment (Docket No. 67,2008). These facts being beyond question, the propriety of such conduct must next be examined.

Beginning as early as 1928, the Courts have disapproved of such practice. In Robinson v. United States, 32 F.2d 505, 510 (8th Cir. 1928), the Court stated:

> The function of a prosecuting attorney and a witness should be disassociated. A jury naturally gives to the evidence of the prosecuting attorney far greater weight than that of the ordinary witness.
>
> * * *
>
> The tendency of a situation where a prosecutor in a criminal case becomes a witness for the Government is to prevent somewhat that fair trial to which a defendant is entitled. ...[T]he practice of acting as prosecutor and witness is not to be approved, and should not be indulged in, except under most extraordinary circumstances.

A prosecutor is a representative of a sovereignty and as such, owes a special duty to refrain from conduct calculated to produce a wrongful conviction. The average jury expects this duty to be served and, consequently, attaches greater weight to the statements of the prosecutor. Berger v. United States, 295 U.S. 78 (1934). "It is especially inadmissible for the prosecutor to put into issue his own personal integrity." United States v. Spangalet, 258 F.2d 338 (2nd Cir. 1958). The policy of this Circuit was no more clearly announced than in United States v. Pepe, 247 F.2d 839 (2nd Cir. 1957), wherein the Court stated:

> ...[W]e deplore the practice of a government prosecutor...injecting himself into the trial of a case unless doing so is unavoidable. If it appears that he is to be a witness for the government, and obviously there are times when that cannot be avoided, the trial of the case should be entrusted to a colleague. 247 F.2d at 844.

See, also United States v. Alu, 246 F.2d 29 (2nd Cir. 1957)

If, then, it is impermissible, except in the most extreme circumstances, for a prosecutor to appear as a witness at a trial, what is the propriety of his appearance as a witness before a grand jury whose proceedings he has conducted. It is clear that the standard called for is a greater rather than a lesser or equal one. In the first instance, while a judge may preclude such testimony at a trial (c.f., Gajewski v. United States, 321 F.2d 261 (8th Cir. 1963)), no such protection is available in the grand jury room. Secondly, with the absence of cross-examination, the testimony of the prosecutor goes unchallenged, with the weight

of his office placed behind it.

In the instant case, the dual role taken by Mr. Levitt was patently unnecessary. From the outset of the grand jury investigation, in February 1973, the proceedings were conducted by Joel Friedman (2007). It was not until virtually the last day of hearing testimony in the Elinvest matter, May 2, 1973, that Levitt appeared for the first time. It is inconceivable that he was at that time unaware that he would be called to testify at a future date, he having conducted the investigation of Elinvest for the Securities and Exchange Commission (1871). Based upon the statement in Mr. Walker's affidavit that Levitt filed his authorization to appear before the grand jury on April 25, 1973, barely one week before he examined Mr. Horvat, it is apparent that the reason for Levitt's appearance was his desire to try out his new-found power rather than any real urgency.

It is respectfully submitted that in the absence of any further facts, the Court would be more than justified in dismissing the indictment based upon Levitt's inexcusable disregard of this fundamental principle of fairness. However, lest the Court feel that any prejudice to defendant Horvat was in the abstract, the Court's attention is respectfully directed to that portion of the transcript of defendant Horvat's grand jury testimony, beginning at page 64, line 21 and ending at page 65, line 7, which reads as follows:

> Q: The prevailing market for the stock you are stating was $6.00 a share?
>
> A: Yes.

Q: You are sure of that?

A: Give or take a quarter I would say I'm pretty sure.

Q: How about give or take $2.00? [Emphasis added]

A: Well, as far as I can recollect I looked in the Pink Sheets where all prices are quoted, and it were four four market-makers and three or four market-makers, and offering stock at $6.00.

Whether Elinvest stock was trading at $4.00, the price at which Horvat sold it to his customers, or $6.00, was obviously crucial to a determination of whether Horvat recommended the stock to his customers in good faith. Nonetheless, Levitt insinuated, by his question, that Elinvest was trading at $4.00, and that this was within his personal knowledge. He completed the process of placing his personal integrity in issue by taking the stand as a witness. It must be noted that the Pink Sheets, which were introduced into evidence at the trial as Horvat's Exhibit "F", clearly indicated that at numerous times during the period in which Horvat sold Elinvest stock to his customers, it was being traded in the range which he stated to the grand jury. Insinuations by a prosecutor, are per se improper, more so where they are contrary to fact. Berger v. United States, 295 U.S. 78 (1934). On another occasion, at page 67, line 7 of Horvat's grand jury testimony, Levitt implied personal knowledge of facts based upon a prior interview with Horvat, stating:

Q: Now prior to coming to the Grand Jury today, last week, did you go over the facts with me?

A: Yes.

The totality of the circumstances had the effect of placing Levitt's credibility as a government attorney in contraposition to that of Horvat. In the context of what is already a one-sided proceeding this conduct is outrageous. Horvat was thereby effectively deprived of his constitutional right to indictment by a grand jury, its role as a screening body having severly been tampered with. It is respectfully urged that the conduct of Mr. Levitt mandated dismissal of the tainted indictment in this case.

## POINT II

## IT WAS ERROR TO REFUSE TO GRANT DEFENDANT HORVAT'S MOTIONS FOR JUDGMENT OF ACQUITTAL AND FOR A NEW TRIAL

At the close of the government's case (2227-2241) a motion was made for judgment of acquittal as to Horvat. Although the court expressed grave doubts as to Horvat's involvement in and knowledge of the conspiracy (2235, 36, 37, 38, 39, 40, 41), the motion was denied (2241). At the close of the defense case the motion was renewed (3306-10) and denied (3310). Subsequent to the verdict, motions were made for judgment of acquittal and for a new trial. These motions were denied (Docket entry 9).

### A. Conspiracy

It was of course essential that the government prove

each and every element of the crime of conspiracy (18 USC § 371) beyond a reasonable doubt. It is defendant Horvat's position that the government failed to prove his knowledge of and intent to join a conspiracy to defraud purchasers of Elinvest stock. This failure goes byond the sufficiency of the evidence in this regard to the total absence of such evidence. Based upon the record, the following points are absolutely clear. First, if Horvat was to have any knowledge of a conspiracy to defraud purchasers of Elinvest stock, it necessarily had to be derived from George Linder, or Robin Baron. Second, neither Linder or Baron ever communicated such knowledge to Horvat. Third, neither Linder nor Baron had a source of knowledge of such a conspiracy. This becomes readily apparent when one examines the testimony given at the trial from two aspects.

The first of these is the status and category of witnesses who testified that they had had personal contact with defendant Horvat in connection with the stock of Elinvest, Inc. Out of the thirty-four witnesses, only four government witnesses stated that they had even heard of Peter Horvat. These were Frank Capsouras, Thomas Nash, Michael Separ and Archibald Denny.(1) All of the foregoing were Horvat's customers and, as such, were certainly not in a position to have given direct testimony of Horvat's involvement in a conspiracy, much less to have been a source of his

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(1) Although he was called as a government witness against Horvat, Eugene Grazianno testified that he had never talked to anyone at Baron & Company with regard to Elinvest (Tr. p. 1906).

knowledge thereof. In fact, the United States attorney, in his opening statement, acknowledged the fact that participants in the conspiracy and substantive crimes were the only ones who could give the inside story of what had occurred (16-17).

The nature of the testimony of each of Horvat's customers was essentially the same. They received a call from Horvat, during the course of which he expressed his opinion as to the future performance of Elinvest stock. They placed orders for that security, received confirmations and sent checks in payment therefor. As simple as this may appear, that is the totality of the government's case against Horvat. Even assuming, arguendo, that the opinions allegedly expressed by Horvat to these customer witnesses were without foundation (a finding which is not only unsupported in the record but also affirmatively disproved), the mere expression of such opinions cannot rationally give rise to an inference that Horvat had knowledge, or intended to become a part of a conspiracy. Beyond this point, one enters the realm of surmise and conjecture, for there is no other testimony concerning Horvat in the balance of almost 4,000 pages of transcripts.

One can even go so far as to examine his exposure to persons who might have imparted that knowledge. There were only two alleged co-conspirators who came into contact with Horvat. These were Robin Baron, Horvat's employer, and George Linder. Baron, although he had pled guilty to one substantive count of the indictment, was not called to testify on behalf of the government. Consequently, assuming him to have been a co-conspirator, which was in no way proven, to attribute knowledge of a conspiracy

to Horvat through Baron would be sheer speculation. Turning then to George Linder, the single contact which he had with Horvat was at the due diligence meeting wherein he addressed all of the salesmen at Baron & Company as a group (3129-39). He presented information about the business and property of Elinvest as well as projections as to its future prospects and the basis therefor. He also exhibited opinion letters with respect to the tradeability of the shares which the salesmen were to sell. There was no testimony that he mentioned anything which would remotely have suggested to Horvat that a conspiracy to defraud purchasers of Elinvest stock was in progress, or contemplated.

Horvat's liability must be based solely upon what he was proven to have known. However, one can even go further and examine the question of whether, on the basis of the evidence adduced, it could even be inferred that Baron or Linder had knowledge of a conspiracy. Aside from Matthew Peterson, David Kauffman and Michael Separ, who were customers of Baron & Company and, thus, had no knowledge of a conspiracy, only George Van Aken and George Linder had any contact with Baron. Van Aken testified that he met both Baron and Linder fortuitously and that he had no part in introducing them to each other (960, 969). He elaborated only upon two conversations which he had with Baron, both prior to Baron's undertaking to sell Elinvest stock (488, 492-4). The questions asked by Baron were those which are to be expected from a prudent broker-dealer who is about to recommend a stock to good customers. Although Van Aken made no promise as to his ability to interest institutional investors in Elinvest, Baron was justifiably

interested in whether his customers would have a future outlet for their stock. The only other conversation between Baron and Van Aken as to which the latter testified concerned the sale of certain shares of Elinvest stock to John Bradley. Van Aken stated that Baron called him saying that he was "heavy" in Elinvest stock and asked if Van Aken could have someone buy 500 shares. Van Aken said that he would have John Bradley purchase the stock (494). Bradley received a confirmation of the purchase. (Government's Exhibit 14-C, 493, 494). This conversation is both unincriminating and incredible. Exhibit 14-C is a confirmation of an agency trade, one in which stock was purchased on the open market to fill a customer's order. Such a trade would do nothing to relieve Baron from his "heavy" position (1966-68). Thus, there is no evidence that Baron derived knowledge of, or joined in a conspiracy through Van Aken.

The only other alleged co-conspirators with whom Baron had dealings were George Linder and Michaelina Martel. They were both present with Baron at a meeting with Stephen Duke. If Baron's knowledge of a conspiracy was to be derived from Linder, the latter must necessarily have been in a position to impart it. But Van Aken repeatedly denied having told Linder anything about a manipulation of Elinvest stock (960, 964, 968). In particular, Van Aken testified as follows:

> Q: Isn't it a fact that you never told George Linder the stock of Elinvest was being manipulated?
>
> A: I didn't tell him it was going to be manipulated.

Q: Yes.

A: That's a fact.

Q: It is your knowledge that he never knew this, is that correct.

A: That's right. (968)

Steven Duke was not named in the indictment as either a defendant or co-conspirator. No other possible source through which Linder could have learned of a conspiracy is apparent.

In view of the foregoing, the court below should have granted Horvat's motions for judgment of acquittal.

> [T]he trial judge should not allow the case to go to the jury if the evidence is such as to permit the jury to merely conjecture or to speculate as to defendant's guilt. United States v. Bethea, 442 F.2d 790, 792 (D.C. Cir. 1971)

A like position was taken by the Court in Cooper v. U.S., 218 F.2d 39 (D.C. Cir. 1954), the Court stating:

> Guilt, according to a basic principle in our jurisprudence, must be established beyond a reasonable doubt, and, unless that result is possible on the evidence, the judge must not let the jury act; he must let it act on what would necessarily be only surmise and conjecture, without evidence. 218 F.2d at 42.

The jury in this case was plainly left to act solely upon what might have been said to defendant Horvat or what might have come to his attention. For, surely, no evidence was presented to it either of a direct nature or from which the jury could have inferred, that Horvat had knowledge of a conspiracy. Suspicion, even grave suspicion, is not enough. Scott v. United States, 232 F.2d 362 (D.C. Cir. 1956). The record of this case mandated the entry of a judgment of

acquittal on this count.

B. Securities Fraud

Turning first to counts 9, 10 and 13, those charging fraud in connection with Horvat's customers, it is clear the the government's case revolves around the predictions which Horvat allegedly made with respect to the future price of Elinvest stock.

Numerous courts have considered the question of whether a prediction as to a future event can be fraudulent within the meaning of the securities laws. A leading case in this area is Marx v. Computer Sciences Corp., 1974 CCH Fed. Sec. L. Rep. ¶ 94,904 (9th Cir. 1974), which involved a projection of future earnings of a corporation. The court held that it is irrelevant whether the prediction, in fact, turns out to be wrong, the standard being whether the person making the prediction believed it to be true at the time it was made and had a reasonable basis for that belief. See, also, G&M, Inc. v. Newbern, 488 F.2d 742 (9th Cir. 1973); R. A. Holman & Co. v. SEC, 366 F.2d 446 (2nd Cir. 1966); Schuller v. The Slick Corporation, 1974-75 CCH Sec. L. Rep. ¶ 95,065 (S.D.N.Y. 1975); Ferland v. Orange Groves of Fla., Inc., 377 F. Supp. 690 (M.D. Fla. 1974). It was, thus, incumbent upon the government to prove, beyond a reasonable doubt, that defendant Horvat did not hold the opinion which he expressed to his customers, or, if he did, that he did not have a reasonable basis for his opinion. No evidence was introduced by the government concerning this essential element. To the contrary, the only evidence in this regard was the extensive testimony of George Linder as to the documents and facts which he obtained with respect to Elinvest

and the basis upon which he arrived at the projections which he conveyed to the salesmen at Baron & Co., including Horvat. (3098-3111, 3114-15, 3119-21, 3123-30, 3130-39). It was not Horvat's burden to show that he had a basis for the projections which he made. The government had the burden of disproving the existence of that basis. This it failed to do. Indeed, all of the witnesses who testified as to the future prospects of the marina were optimistic. Charles Berlin, a purchaser of the stock stated that marinas were a lucrative business (275). Barrie Morrison, another government witness and purchaser stated that one reason he was interested in Elinvest was that he knew that dock space in marinas was difficult to obtain (299). George Van Aken indicated that the 36 acres of waterfront property alone was worth $1 million and that the balance sheet of the company showed a very positive net worth (404). He expected the company to earn between $100,000 and $200,000 in 1971 (454, 646). William Rambusch, the president of Elinvest, had similar expectations (845). Van Aken testified that the company intended to build a boatel or apartment complex on the property along with a swimming pool. Other acquisitions were contemplated and, in general, Van Aken intended to build the company up (845). The prospects for the company's future were good (860), and he expected the company to succeed (954). John Bradley testified that several people wanted to locate restaurants and sporting activities at the marina and that Bert Bachrach was looking to open a restaurant there (989). Bradley thought it was a very good property (1036a). Frank Rambusch stated that Van Aken expected the stock to increase substantially in value (1125), up to $10 a

share (1126). Peter Curreri testified that he had heard from Van Aken, William Rambusch and Jim Feeney that mergers and acquisitions were contemplated, particularly with the Bates and Toad-Conklin marinas. Leslie Willeford analyzed the potential of Elinvest and viewed it as an investment situation with a high probability of profit. Horvat is plainly entitled to a judgment of acquittal on counts 9, 10 and 13 based upon the total failure of the government to establish this essential element.

Although Horvat was found guilty with respect to each of counts 7 through 13 of the indictment, which counts charged fraud in connection with the purchase and sale of Elinvest stock, there was, however, only testimony as to Horvat's dealings with Eugene Grazianno (count 9), Michael Separ (count 10) and Archibald W. Denny, Jr. (count 13). None of the individuals named in counts 7, 8, 11 and 12 indicated that they dealt with Horvat even in the most remote way. Indeed, none of them even mentioned his name. Thus, it is clear that if Horvat was to be found guilty on these counts, his guilt must rest on one of two theories.

The most obvious possibility is that of "aiding and abetting." 18 USC § 2. The long established criteria for conviction as an aider and abetter is that a defendant

> ... in some sort associate himself with the venture, that he participate in it as something that he wishes to bring about, that he seek by his action to make it succeed. Nye & Nissen v. United States, 336 U.S. 613, 619 (1948), citing United States v. Peoni, 100 F.2d 401, 402 (2nd Cir. 1938).

Upon the basis of the Court's submission of each individual count to the jury, it was necessary for it to find, with respect to the

fraud charged in the particular count, that Horvat met all of the above criteria. The record is devoid of any such proof.

Count 7 of the indictment refers to the purchase of 100 shares of Elinvest stock by Matthew Peterson. Mr. Peterson testified that he purchased the stock after speaking to Mr. Baron (2043). He further stated that he never met Horvat and did not know who he was (2049-50). Count 8 of the indictment concerns the purchase of 25,000 shares of Elinvest stock by the Astron Fund, Inc. Those shares were purchased through Van Aken by defendant Blitz in Tacoma, Washington. Neither testimony of Van Aken or Blitz indicated that Horvat was even known to them and, in fact, defendant Blitz was acquitted of securities fraud on this count. Counts 11 and 12 of the indictment relate to the purchase of 15,000 and 10,000 shares of Elinvest by Barrie Morrison and Charles Berlin, respectively. Those purchases were made through a brokerage house called R. J. Rosan & Co., Inc., the principal of which, Robert Rosan, was acquitted on all counts of the indictment.

At the very least, one must know about the crime which the principal is committing. There was no evidence to that effect. He must have taken some action to assist the principal. This was likewise unproven. It is not enough that something he did might have coincidentally assisted the perpetrator of the crime. There must have been a unity of purpose. There was none here. Whether or not those particular persons named in counts 7, 8, 11 and 12 purchased Elinvest stock was of no interest to Horvat and in no way did their purchases assist Horvat in selling to his customers. In short, there was not the vaguest hint of evidence which would

have supported Horvat's conviction on counts 7, 8, 11 and 12 as an aider and abetter.

The only explanation for such conviction is that the jury, despite the absence of a charge thereon, found Horvat guilty of these substantive charges based upon their finding him guilty of conspiracy. C. F. Pinkerton v. United States, 328 U.S. 640 (1946). It is submitted that not only did the jury base its verdict with respect to counts 7, 8, 11 and 12 upon a Pinkerton theory, but that its verdict on all of counts 7 through 13 were arrived at in that manner. If this is the case, the convictions on these counts must fall; for, as has been amply demonstrated hereinabove, the evidence was insufficient to sustain a conviction for conspiracy. Assuming, arguendo, that there was a valid basis for a conviction with respect to counts 9, 10 and 13 (and, as demonstrated above, there was none) it is equally possible that the guilty verdict on these counts was grounded upon the improper finding of guilt with respect to the conspiracy count. A verdict must be set aside where it is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected. Yates v. United States, 354 U.S. 298, 312 (1957); Stromberg v. California, 283 U.S. 359 (1930); Williams v. North Carolina, 317 U.S. 287 (1942); Cramer v. U.S., 325 U.S. 1 (1944). Since the verdict on the substantive counts herein could have been based upon an improper ground, Horvat's unproven involvement in a conspiracy, it must be set aside.

C. Mail Fraud

The fact that the jury returned a verdict of guilty on

each of the mail fraud counts serves to underscore the conclusion that their entire verdict was based upon a Pinkerton theory. Bearing in mind the fact that each count of mail fraud constitutes a separate offense, it was necessary for the government to prove, with respect to each particular count, that Horvat devised a scheme to defraud the individual named therein and mailed, or caused to be mailed the item alleged therein. Knowledge, of course, is a necessary element of the proof. One searches the record in vain for any evidence that Horvat was even aware of the existence of those people named in counts 14 through 18, or that they ever had contact with him. Neither is there any proof that he, in any manner, was instrumental in the placement of the alleged confirmations in the mail. With the exception of David Kauffman (count 14), all of the customers named in these counts were those of other broker-dealers than that by which Horvat was employed. Kauffman testified that Elinvest stock was sold to him by Baron alone (1691). It was, therefore, the latter who placed, or caused to be placed in the mail the confirmation to him. The discussion hereinabove with respect to aiding and abetting is equally applicable to these counts. Horvat lacked both the knowledge, the common purpose and the affirmative action necessary to have been an aider and abetter. Once again, the query must be, "Of what interest was it to Horvat if any person, other than his own customer, purchased Elinvest stock?" Even in the case of customers of Baron & Co., it was Baron who would be interested in Horvat's sales, but not the reverse. In the absence of even a scintilla of evidence that Horvat was in any way involved in the

crimes charge in counts 14 through 18, the conclusion is inescapable that the guilty verdict rendered as to these counts were based upon some brand of reasoning akin to Pinkerton.

That being the case, the convictions in these counts must be set aside based upon the total failure of the evidence with respect to the conspiracy count.

## POINT III

### A NEW TRIAL FOR DEFENDANT HORVAT IS MANDATED BY REASON OF THE COURT'S FAILURE TO PROTECT HIS RIGHTS AS A FRINGE DEFENDANT.

As indicated hereinabove, Horvat's position in this prosecution was extremely tenuous. The testimony of Frank Capsouris, a customer of Horvat, was the first evidence directed specifically at him. This came on the tenth day of trial after 1743 pages of transcript out of the total of 2209 pages constituting the government's case. It is also noteworthy that the record contains only 39 pages of direct testimony against Horvat which is divided among five customer witnesses.

By the time the government reached its case against Horvat, the jury had heard a plethora of evils committed by both admitted conspirators and defendants other than Horvat. There was testimony of $50,000 in bribes paid by Van Aken to Rosenthal to induce him to fraudulently induce Berlin and Morrison to purchase Elinvest stock. Blitz allegedly received a $25,000 bribe to purchase 25,000 shares for the Astron Fund. Van Aken, Rosan, Mark Ross and Barry Ross made an agreement to move up the price of Elinvest stock

through the placement of shares in the hands of brokers who were guaranteed against any loss. There was extensive testimony with respect to a "boiler room" operation being conducted in Van Aken's apartment involving Orpheus, Drew, Santini, McLeod and Gerstenzang. The jury heard evidence of the extortion of $12,500 by Barry Ross from Van Aken and of Van Aken's swindling William Rambusch out of his Elinvest stock. All of this evidence came in before Horvat's name was even mentioned and none of it was in any way linked to him.

A significant aspect of the government's case, and one which it pursued both overtly and surreptitiously, was the repeated allusion to the fact that members of organized crime were involved in the conspiracy as well as other persons inclined toward violence. One such person was Frank Bruno, who was added as a defendant in the superseding indictment. Although he was subsequently severed from the trial of the other defendants for their protection, the government took every opportunity to convey to the jury the type of person he was as well as his affiliations. Other such persons were Sonny Santini and William Drew.

Testimony was elicited that Bruno was a gangster (479) and that he extorted $12,500 from Van Aken through threats of violence (477). On one occasion, Bruno reached across a table and grabbed Van Aken by the collar (1237). Van Aken (535) and Barry Ross (1248) (not coincidentally, it is submitted) both mentioned the fact that on one occasion in Van Aken's apartment Bruno and Santini went into the kitchen and began speaking Italian. The clear implication sought was that both had Mafia affiliations.

After that conversation Santini said to Barry Ross, who brought Bruno to the meeting, that if it weren't for Bruno (a/k/a Turco) he would break both of Ross's arms (1248).

The prosecution also resorted to subtle means of conveying to the jury the fact that Bruno and Santini were criminals. On several occasions mug shot showing front and side views of Bruno and Santini were left on the end of the government's counsel table closest to the jury in plain view (501, 1221). Bruno's mug shots were shown both to Van Aken (476) and Barry Ross (1229) without any attempt to link them to anything in the case. Indeed, they were never offered into evidence. Although the court recognized the prejudicial nature of the mug shots, and directed the government to cut off the side views (1224), this was not until after the damage had been done. Motions for a mistrial based upon this conduct were repeatedly made and denied (501, 1221, 1264). Not being content that the jury had gotten the intended picture, Assistant U.S. Attorney Walker asked defendant Rosan, "You knew that Barry Ross had certain connections with Organized Crime, did you not?" (2940). The court admonished Mr. Walker about this statement (2953) but denied defense motions for a mistrial (2940, 2953). In his summation, Mr. Walker, when mentioning Santini, repeatedly followed the reference with "We know about Santini" (3407). Upon objection to these references, the judge indicated that he had taken notice of them (3436), but nonetheless denied a motion for a mistrial.

Bruno and Santini were not the only "heavies". Defendant Drew, an alleged participant in the "boiler room", was stated

to have grabbed Julie Gladstein (524) and Irwin Gerstenzang (530) in order to get them back to work. At one point, in order to quell Van Aken's objection to Santini's continued use of his apartment, Drew said to Van Aken, "If you get wise you can be pushing up daisies." (524).

It is respectfully urged that the court below erred in not granting a mistrial based upon this highly improper conduct on the part of the prosecution. Perhaps even more important, though, is the cumulative effect which the misdeeds of Horvat's co-defendants had upon the jury in assessing his guilt or innocence. The status of Horvat is strikingly similar to that of defendant Shuck in United States v. Kelly, 349 F.2d 720 (2d Cir. 1965). In fact, if any dissimilarities exist, they are that the evidence against Shuck more strongly indicated that he did participate in a conspiracy, although not the overall conspiracy, that Shuck was in a supervisory position in his brokerage house rather than a mere salesman, as was the case with Horvat, and that Shuck's office was a "boiler room", while no such proof was adduced as to Baron & Co. In Kelly, this court stated with respect to Shuck:

> "While there was evidence from which the jury might have inferred that Shuck together with Van Allen, the salesmen in Shuck's office and perhaps others conspired to undertake a pressure campaign, or "boiler room" operation to induce individual investors to buy Gulf Coast Leaseholds stock at inflated prices and hold it, the proof supporting participation by Shuck in the single, over-all conspiracy alleged in the indictment is tenuous and unsubstantial. He knew nothing about the sale of the 750,000 shares of unregistered stock or the backing and filling over the debentures and their sale to Brandel Trust." 349 F.2d at 756.

Based upon this finding, the court went on to state:

> "What were the safeguards for the protection of Shuck that the trial judge should have applied and made "impregnable"? One not mentioned by Mr. Justice Rutledge in Blumenthal [v. United States, 332 U.S. 539, 68 S. Ct. 248, 92 L.Ed. 154 (1947)] but which is peculiarly applicable in this case was the granting of a severance as to Shuck the moment it appeared that he was likely to be prejudiced by the accumulation of evidence of wrongdoing by his co-defendants. Another was by making clear in the instructions to the jury that the proofs against Shuck were different from the proofs against Kelly and Hagen, pointing out what the difference was, as we have just done in a few sentences, and making sure that Shuck was given separate and individual attention as distinct from Kelly and Hagen. A third safeguard was, by interim instructions and by positive and clear instructions at the close of the case, to give Shuck every possible protection against the use of prejudicial and inadmissible testimony and exhibits." 349 F.2d at 756-757.

With respect to Horvat, there was no proof whatsoever that he was aware of any of the alleged payoffs to Rosenthal, Blitz, Rosan or Bruno. No evidence was adduced that he was privy to any information regarding the alleged agreement between Van Aken, Barry and Mark Ross and Rosan to manipulate the price of Elinvest stock upward. (Indeed, that agreement was made on July 16 (1195) while the last of Horvat's customers who testified that he purchased Elinvest stock, Archibald Denny, stated that his purchase was made on July 7 (2068).) Nowhere in the record is there even a hint that Horvat had any knowledge of the activities taking place at Van Aken's apartment, nor of the existence, affiliations or propensities of Bruno, Santini or Drew. In short, there is not a scrap of evidence indicating that Horvat knew of any of the wrongdoings of his co-defendants. Nonetheless, his motions for a severence before and during the trial were repeatedly denied (Minutes of Pretrial Conference, docket number 12,

page 12; 38-39, 2234, 3310). This court stated in Kelly,

> "It is well settled that the trial judge is under 'a continuing duty at all stages of the trial to grant a severance if prejudice' to a particular defendant is made manifest." Schaffer v. United States, 362 U.S. 511, 516, 80 S. Ct. 945, 948, 4 L.Ed. 921 (1960), 349 F.2d at 759.

It could not be clearer that the prejudice to Horvat accumulated and became more apparent with each passing day. And just as Shuck in Kelly waited three months of a nine-month trial before his name was mentioned, Horvat waited three weeks of a five-week trial for the first reference to him to be made. The steady flow of evidence and admissions of payoffs, extortion, assaults, market manipulation and high pressure, "boiler room" tactics could only have had the effect of branding Horvat's co-defendants as accomplished con men in the eyes of the jury. It cannot be doubted that some of this spilled over onto Horvat. The failure of the court to protect him by granting a severance mandates a new trial.

The court below also failed to provide the second indispensible safeguard mandated by this Court in Kelly, that of instructing the jury that the proofs against Horvat were different from that against the other defendants, pointing out the differences and giving Horvat separate and individual attention as distinct from the other defendants. As noted above, the essence of the government's case against Horvat was the alleged projections which he made to his customers as to the future performance of Elinvest stock. Although no other defendant was similarly situated, the court only charged the jury generally as to the elements of securities and mail fraud. The court refused the following

requested charge:

> MR. DORFMAN: In particular, with regard to our requests to charge, I would ask at this time that your Honor add to the charge a statement in respect to misstatements or omissions to state material facts, that the jury must find whether or not in fact there was a fact being stated or an opinion, and I have requested the Court to charge the jury that opinions of themselves do not violate the security law, and that if a person has a reasonable basis for holding such an opinion, he is not guilty of a criminal violation of the securities law.
>
> THE COURT: All right. I am not going to charge that, but you have an exception to my failure to charge that. (3794-95)

It is respectfully, and most strenuously, urged that this was perhaps the single most significant aspect in separating Horvat from the rest of the defendants. Nonetheless, the court failed to take this final and most crucial opportunity to distinguish the proofs as to Horvat.

The third safeguard stated in Kelly was to give positive and clear instructions at the close of the case to protect the defendant against prejudicial and inadmissible testimony and exhibits. During the trial the court received much evidence

and testimony subject to connection. In his charge, the judge instructed the jury that all of the evidence received in this manner could be used against a particular defendant once it was found that he was a member of the conspiracy (3758). However, the court did not instruct the jury that it could not use all of this evidence to make the initial determination that a particular defendant was a member of the conspiracy. Thus, the jury was permitted to bootstrap a defendant into being a conspirator on the basis of evidence which could only come in against him if he were a conspirator. In Horvat's case, this error was particularly eggregious since, as has been amply demonstrated above, a massive amount of testimony and evidence concerned people and events which were in no way linked to him.

In summary, the court below disregarded every one of the mandatory safeguards announced in Kelly, the effect of which was to prejudice Horvat fatally. It is most respectfully submitted that by reason thereof, Horvat is entitled to a new trial in the interest of justice.

## CONCLUSION

The Judgment of Conviction Against Defendant Horvat Should Be Reversed and the Court Should Direct Entry of a Judgment of Acquittal or, in the Alternative, a New Trial Should Be Ordered.

Respectfully Submitted,

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*Produced by*

WORD PROCESSING CORPORATION
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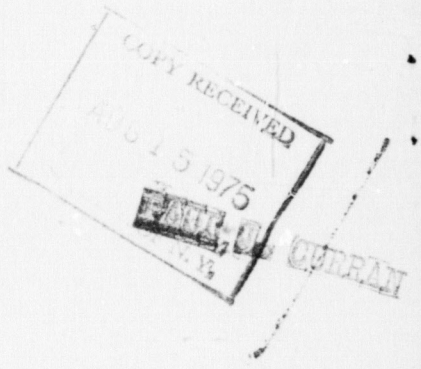
New York, New York 10013
*212/966-2165*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